(9)

Supreme Court, U.S.
FILED
MAR 6 1997
CLERK

No. 96-651

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

JAMES E. GILBERT, *et al.*,
Petitioners,
v.
RICHARD J. HOMAR,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE NATIONAL EDUCATION ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

ROBERT H. CHANIN
(Counsel of Record)
JOHN M. WEST
BREDHOFF & KAISER, P.L.L.C.
1000 Connecticut Avenue, N.W.
Suite 1300
Washington, D.C. 20036
(202) 833-9340
Counsel for Amicus Curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

20 pp

TABLE OF CONTENTS

	Page
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
PETITIONERS' INTEREST IN IMMEDIATELY SUSPENDING RESPONDENT FROM HIS EMPLOYMENT DUTIES DID NOT ALSO JUSTIFY SUSPENDING HIM FROM PAY STATUS WITHOUT A PREDEPRIVATION HEARING	
A. The Analytical Framework	3
B. The *Mathews v. Eldridge* Balancing Test	6
C. The Clear and Workable Principle Articulated by the Third Circuit	14
CONCLUSION	17

TABLE OF AUTHORITIES

CASES — Page

Barry v. Barchi, 443 U.S. 55 (1979) 13
Boddie v. Connecticut, 401 U.S. 371 (1971) 3, 4
Board of Regents v. Roth, 408 U.S. 564 (1972) 16
Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985) ..... *passim*
Engdahl v. Department of Navy, 900 F.2d 1572 (Fed. Cir. 1990) 16
FDIC v. Mallen, 486 U.S. 230 (1988) ..... *passim*
Homar v. Gilbert, 89 F.3d 1009 (3d Cir. 1996) ..... *passim*
Mathews v. Eldridge, 424 U.S. 319 (1976) ..... *passim*
Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 3
Parratt v. Taylor, 451 U.S. 527 (1981) 5
United States v. James Daniel Good Real Property, 510 U.S. 43 (1993) 4

STATUTES AND REGULATIONS

5 U.S.C. § 7503(b) 12
5 U.S.C. § 7532 16
5 C.F.R. § 752.203(c) 12
4 Pa. Code § 7.173 9

OTHER AUTHORITIES

Ellen Graham, *What Money Just Can't Buy*, Wall Street J., Sept. 20, 1996, 1996 WL-WSJ 11799143 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-651

JAMES E. GILBERT, *et al.*,
Petitioners,

v.

RICHARD J. HOMAR,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF OF THE NATIONAL EDUCATION ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

This brief *amicus curiae* is filed by the National Education Association ("NEA"), with the written consent of the parties, in support of respondent Richard J. Homar.

INTEREST OF AMICUS CURIAE

NEA is a nationwide employee organization with a current membership in excess of 2.2 million persons, the vast majority of whom are employed by public school districts, colleges, and universities throughout the United States. NEA (through a network of affiliated state and local associations) represents its members in dealing with

their employers in regard to salaries, hours, and working conditions. This representation often is based on rights that are guaranteed to public employees by the United States Constitution, including the right to procedural due process under the Fourteenth Amendment.

SUMMARY OF ARGUMENT

In *Mathews v. Eldridge*, 424 U.S. 319 (1976), this Court set forth a three-factor balancing test to be used in "consider[ing] the extent to which due process requires an evidentiary hearing prior to the deprivation of some type of property interest even if such a hearing is provided thereafter." *Id.* at 333. Applying these factors to the termination of a tenured public employee in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), this Court held that a minimal predeprivation "hearing" —*i.e.*, notice and an opportunity to respond—is constitutionally required.

When respondent Homar, a "tenured" public employee within the meaning of *Loudermill*, was arrested on drug charges, he was suspended—both from his employment duties as a member of petitioners' police force *and* from pay status—without a predeprivation hearing. Although this case differs from *Loudermill* in that the deprivation Homar suffered was not termination of his employment, but rather suspension without pay, a predeprivation hearing would be required *unless*, under the exception recognized in *FDIC v. Mallen*, 486 U.S. 230, 240 (1988), the necessity for immediate governmental action justified postponement of that hearing. There is no dispute about the fact that petitioners' interest in maintaining public safety and preserving the integrity of their police force justified the immediate suspension of Homar from his duties as a police officer. But neither that interest—nor any other government interest—justified petitioners in suspending Homar's pay without first affording him the minimal due process requirements of notice and an opportunity to respond.

The principle adopted by the Third Circuit—that, as a general matter, a public employer must provide notice and an opportunity to respond before suspending a tenured employee from pay status—provides clear constitutional guidance to public employers who must make day-to-day employment decisions. The Third Circuit's principle is, moreover, eminently workable, as evidenced, *inter alia*, by the fact that it parallels the regulations that govern federal employment.

ARGUMENT

PETITIONERS' INTEREST IN IMMEDIATELY SUSPENDING RESPONDENT FROM HIS EMPLOYMENT DUTIES DID NOT ALSO JUSTIFY SUSPENDING HIM FROM PAY STATUS WITHOUT A PREDEPRIVATION HEARING

A. The Analytical Framework

The issue presented in this case can be appropriately framed by setting forth certain fundamental propositions as to which there is no dispute:

1. As a general rule, due process requires that deprivation of a constitutionally protected property interest must "be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Loudermill*, 470 U.S. at 542 (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)). This Court repeatedly has made clear that " 'the root requirement' of the Due Process Clause [is] 'that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest.' " *Loudermill*, 470 U.S. at 542 (quoting *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971)) (emphasis in original).

2. The requisite predeprivation "hearing" need not be elaborate. In holding that a hearing was required prior to *termination* of the employment of a tenured public

employee,[1] this Court stated that a "full evidentiary hearing" is not required prior to the deprivation. *Loudermill*, 470 U.S. at 545. Rather, "something less," *id.* (quoting *Mathews*, 424 U.S. at 343), is sufficient: "[T]he pretermination hearing need not definitively resolve the propriety of the discharge. It should be an initial check against mistaken decisions . . . ." *Loudermill*, 470 U.S. at 545. This Court then described the required predeprivation hearing as follows:

> The essential requirements of due process . . . are notice and an opportunity to respond. . . . The tenured public employee is entitled to *oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story.*

Id. at 546 (emphasis added). Certainly no more would be required here, when the issue is suspension as opposed to termination.

3. Although the requirement for this minimal predeprivation hearing is not absolute, this Court has emphasized the exceptional nature of any departure from the requirement:

> We tolerate some exceptions to the general rule requiring predeprivation notice and hearing, but only in " 'extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.' "

United States v. James Daniel Good Real Property, 510 U.S. 43, 53 (1993) (quoting *Boddie*, 401 U.S. at 379). One circumstance—and the only one even arguably ap-

---

[1] In this brief, we use the term "tenured"—as this Court used the term in *Loudermill*—as a shorthand designation for an employee who, by virtue of applicable state law, has a property interest in continued employment. There is no dispute that Homar had such a property interest. *See Homar v. Gilbert*, 89 F.3d 1009, 1014 (3d Cir. 1996).

plicable here—under which a postdeprivation hearing will be held to satisfy constitutional requirements is where "the necessity of quick action by the State," *Parratt v. Taylor*, 451 U.S. 527, 539 (1981), precludes a predeprivation hearing. Thus, "[a]n important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard until after the initial deprivation." *Mallen*, 486 U.S. at 240.

4. There is no contention in this case that petitioners were required to provide Homar with a hearing before suspending him *from his employment duties*: petitioners' interest in maintaining public safety and preserving the integrity of their police force surely justified this action immediately upon Homar's arrest on drug charges. *See Homar v. Gilbert*, 89 F.3d 1009, 1015 (3d Cir. 1996) ("We agree with the district court that there was a compelling governmental interest which supports ESU's decision to suspend Homar [from his employment duties] immediately and without a hearing pending further investigation.").

It is within the analytical framework established by the foregoing propositions that we turn to the narrow question this case presents: whether the government interest that justified petitioners' departure from the general rule of a predeprivation hearing in suspending Homar from his duties as a police officer, *also* justified suspending Homar from *pay status* without first affording him the minimal due process rights set out by this Court in *Loudermill*—*i.e.*, notice of the charges against him and an opportunity to present his side of the story to the decisionmaker. *See* 470 U.S. at 546. As we now show, the answer to this question is "no."

B. The *Mathews v. Eldridge* Balancing Test

In *Mathews v. Eldridge, supra*, this Court set forth a three-factor balancing test to be used in "consider[ing] the extent to which due process requires an evidentiary hearing prior to the deprivation of some type of property interest even if such a hearing is provided thereafter." *Mathews*, 424 U.S. at 333. These factors are:

> *First*, the private interest that will be affected by the official action; *second*, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and *finally*, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335 (emphasis added). Application of these factors led this Court in *Loudermill, supra*, to conclude that a predeprivation hearing—*i.e.*, notice and an opportunity to respond—is constitutionally required when government seeks to terminate the employment of a tenured public employee. 470 U.S. at 542-45. The same conclusion follows in the present context.

1. This case differs from *Loudermill* in regard to "the private interest that [is] affected by the official action," 470 U.S. at 335, in that the deprivation suffered by Homar was not termination of employment, but rather—as pertinent to the issue that is before this Court—suspension from pay status. Although the district court thought it "unclear whether due process protections extend to employment discipline short of termination," Pet. App. at 59a, the Third Circuit had no doubt on this score, "find-[ing] the requirements of *Loudermill* to be applicable in this instance." 89 F.3d at 1014. The Third Circuit clearly was correct: Homar had a property interest in his continued employment, and he was deprived of a substantial aspect of that property interest—*i.e.*, his right

to an uninterrupted flow of income. As this Court observed in *Loudermill*:

> We have frequently recognized the severity of depriving a person of the means of livelihood. While a fired worker may find employment elsewhere, doing so will take some time and is likely to be burdened by the questionable circumstances under which he left his previous job.

470 U.S. at 543 (citations omitted).

As to an employee's ability to "find employment elsewhere," the stigma of a suspension from employment hardly will be less than that which stems from a termination of employment. One can readily recognize the difficulties Homar would have encountered had he informed potential employers that he was looking for a new job because he had been suspended from his position as a police officer as a result of his arrest on drug charges. Even after the criminal charges against him were dismissed, the stigma likely would have remained. Indeed, although both a terminated and a suspended employee doubtless would hope to resume their prior employment, because of the inherent ambiguity of a suspension, the latter would, if anything, be less likely than the former to seek—much less be successful in obtaining—alternative interim employment.

Nor can it be determinative that a suspension is, by definition, temporary, for even a temporary loss of income can be as ruinous as a termination of employment. As a recent study has confirmed, a large proportion of Americans—about one-third—live from paycheck to paycheck (or worse), unable to accumulate savings that would absorb the impact of even a temporary loss of income. *See* Ellen Graham, *What Money Just Can't Buy*, Wall Street J., Sept. 20, 1996, 1996 WL-WSJ 11799143. The "severity of depriving a person of the means of livelihood" that this Court recognized in *Loudermill*, 470 U.S. at 543,

may be tempered, but it hardly is obviated, by the temporary nature of the deprivation.

That is particularly the case where, as here, the suspension is of indeterminate duration. Homar's pay was suspended "pending further investigation and disposition of the criminal charges" against him. 89 F.3d at 1012. Had his case gone to trial, Homar's suspension could well have continued for months, or conceivably even years. Moreover, as the letter of suspension informed Homar, petitioners' action would not necessarily "coincide" with the disposition of the criminal charges. *Id.* The suspension was thus truly of indefinite duration—and in fact it was prolonged well past the time the state court ordered the criminal charges dismissed. *Id.* Under such circumstances, the interest of Homar that was affected by petitioners' action clearly is substantial.

2. The risk of "an erroneous deprivation" of the employee's interest is the second factor in the *Mathews* ballancing test. As this Court observed in *Loudermill*, "some opportunity for the employee to present his side of the case is recurringly of obvious value in reaching an accurate decision." 470 U.S. at 543. That is so, this Court noted, both because of the possibility of factual disputes relating to the basis for the disciplinary action, and because a hearing before the discipline takes effect is likely to be the employee's "only meaningful opportunity to invoke the discretion of the decisionmaker." *Id.*

Petitioners contend that analysis of the second *Mathews* factor in this case is controlled by *Mallen, supra,* rather than *Loudermill.* In *Mallen*, this Court indicated that in exceptional cases where an important government interest demanded immediate action, a predeprivation hearing could be dispensed with if there were "a substantial assurance that the deprivation is not baseless or unwarranted." 486 U.S. at 240. Unlike *Mallen,* however, where the "substantial assurance" derived from the fact that "[a] grand jury had determined that there was prob-

able cause to believe that appellee had committed a felony," *id.* at 241, there was no such judicial determination of probable cause in this case. Homar's arrest was based solely on the decision of the policeman who found Homar at the scene of a drug raid. And when Homar's case was brought before the judiciary at a hearing six days after his arrest, the court dismissed all charges against him. *See* 89 F.3d at 1012. Inasmuch as there never was any judicial determination of probable cause, and the charges against Homar were dismissed as soon as they came before a court, the suggestion of petitioners and their *amici* that the same "substantial assurance" was present here as in *Mallen* is, to say the least, unconvincing.

Petitioners also suggest that a hearing would have been of little value in this case because applicable state regulations *required* petitioners to suspend Homar without pay "as soon as practicable" after his arrest on a felony charge. Brief for Petitioners at 20-21 (quoting 4 Pa. Code § 7.173); *see id.* at 3-4. Thus, petitioners argue that the decision to suspend Homar from pay status involved no discretion, and turned only on the undisputed fact that he had been arrested on a felony charge. But the record does not support this argument.

In the first place, petitioner Levanowitz—the Director of Human Resources who made the decision to suspend Homar—was equivocal on whether he believed the regulation in question (part of the Governor's Code of Conduct for Appointed Officials and State Employees) was binding upon him. Levanowitz testified on deposition that, while he "did refer to this [regulation] and let it guide my actions *somewhat* in this case," Joint Appendix at 67a (emphasis added), he was "not sure" that he was "obliged" to follow it in suspending Homar. *Id.* at 66a-67a. Indeed, if the regulation petitioners cite had been the basis for Homar's suspension, the suspension would have been lifted when the criminal charges against him were dismissed. But it was not. In informing Homar of his suspension, Levanowitz stated that the university's action

would not necessarily "coincide with the disposition of those [criminal] charges through the legal process," 89 F.3d at 1012, and although all criminal charges against Homar were dismissed six days after his arrest, the suspension without pay remained in effect for another 23 days. *Id.*

In short, whether Levanowitz thought himself bound by the state regulation or not, he imposed a suspension without pay that was to (and did) remain in effect well beyond the regulation's requirements. Far from the almost ministerial act petitioners portray, Levanowitz' decision to suspend Homar for an indefinite period independent of the resolution of the criminal charges against him—and the decision to continue the suspension even after the criminal charges were dismissed—quite evidently involved both the consideration of factual issues other than simply Homar's arrest, and the exercise of discretion on the part of Levanowitz. In respect to these decisions, the opportunity for Homar to present his side of the story would have been of "obvious value in reaching an accurate decision." *Loudermill,* 470 U.S. at 543.

3. In this case, it is the third factor of the *Mathews* balancing test—*i.e.*, "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail," *Mathews,* 424 U.S. at 335—that is decisive. Only an *"important* government interest," one "demanding prompt action," will "justify postponing the opportunity to be heard until after the initial deprivation." *Mallen,* 486 U.S. at 240 (emphasis added). *See also* Brief for the United States at 14, 20 (requisite government interest must be "weighty").

In applying this factor, we reiterate that the question in this case is *not* whether there was a sufficiently "important government interest" to justify suspending Homar from his employment duties without notice and an opportunity to be heard—it is conceded that such an interest existed.

The question concerns Homar's suspension from pay status, and in this regard one searches in vain for *any*—much less an "important" or "weighty"—government interest.

In purporting to find the necessary government interest, the district court commented as follows:

> Homar was certainly charged with important law enforcement responsibilities and the preservation of public safety. His arrest on a drug-related charge implicated important governmental interests in maintaining public confidence in our law enforcement agents.

Pet. App. at 61a. Those interests, to be sure, were sufficient to justify petitioners' decision to suspend Homar from his duties as a police officer without a predeprivation hearing. But they do not speak to Homar's immediate suspension from pay status. As the Solicitor General puts it in his brief on behalf of petitioners, "[t]he district court appeared to assume interests in law enforcement integrity and public safety that address the suitability of Homar remaining in a duty status *but that do not concern the appropriateness of his being suspended without pay.*" Brief for the United States at 24 (emphasis added).

While it is true, as another of petitioners' *amici* points out, that "[t]he Court's cases recognize that even as substantial an interest as maintaining one's livelihood must at times yield to the government's interest in taking prompt action," Brief of the International City-County Management Association *et al.* at 6, those interests simply are not in conflict here. The government's concededly important interest in ensuring that a police officer arrested on felony drug charges does not continue to function as a police officer can be fully vindicated by immediately suspending him from his employment duties—*without* also suspending the officer's pay before affording him notice and an opportunity to respond.

The only interest that even arguably might militate against a suspension *with pay* pending a hearing is peti-

tioners' fiscal interest in avoiding the expense of paying Homar while he was not performing any employment duties. But recognition of the nature of the "hearing" in question makes it clear that this fiscal interest is truly *de minimis*. As we have previously noted, the hearing to which the employee is entitled prior to suspension from pay status is not a full adversary hearing, but simply "notice and an opportunity to respond." *Loudermill*, 470 U.S. at 546. Nor is this a hearing at which the employer need "definitively resolve the propriety" of the suspension from pay status; rather, it is merely "an initial check against mistaken decisions." *Id.* at 545. Thus, the employer is under no compulsion, prior to this hearing, to investigate the matter fully, to prepare a case for presentation to a hearing officer, or even to gather any additional evidence beyond that which sparked the proposed suspension. The Due Process Clause requires, at this point, only that the employer stay its hand until notice of the proposed action has been given to the employee, and the employer has listened to what the employee has to say in response.[2]

Absent unusual facts (such as, for example, an employee at a distant location), such a hearing need delay the employer's action by no more than a few days.[3] Accordingly, even when an important government interest

---

[2] Because of the minimal and preliminary nature of the predeprivation hearing at issue, the considerations here are quite different from those that were before this Court when it considered the timing of a *postdeprivation* hearing in *Mallen*. Inasmuch as that hearing was to render "the ultimate decision" on Mallen's suspension, 486 U.S. at 244, this Court observed that "[t]he magnitude of the public interest in a correct decision counsels strongly against any constitutional imperative that might require overly hasty decisionmaking." *Id.*

[3] As the Solicitor General points out, the "reasonable time to answer" that federal regulations provide for federal employees threatened with suspension (of 14 days or less) is defined as "not less than 24 hours." Brief for the United States at 4 (citing 5 U.S.C. § 7503(b); 5 C.F.R. § 752.203(c)).

requires that an employee be suspended from his employment duties before a hearing can be held, the cost of continuing the employee in pay status until he can be given notice and an opportunity to respond will be minimal. As in *Loudermill*, "affording the employee an opportunity to respond prior to termination would impose neither a significant administrative burden nor intolerable delays." 470 U.S. at 544.

In support of their position, petitioners rely on two cases in which this Court has held suspensions permissible without a predeprivation hearing. *See Mallen, supra* (Federal Deposit Insurance Corporation ("FDIC") order suspending officer of federally insured bank); *Barry v. Barchi*, 443 U.S. 55 (1979) (state racing board suspension of horse trainer's license). But this reliance is misplaced. Neither *Mallen* nor *Barry* involved the government interest in suspending the employees' pay;[4] both were concerned with the admittedly more weighty government interest in removing the employees from their employment duties. *Mallen*, in particular, points up the dispositive significance of this difference.

In *Mallen*, the FDIC, acting pursuant to federal law, ordered the immediate suspension of a bank president and director from any further participation in the bank's affairs (or the affairs of any other federally insured bank), upon his indictment for making false statements to the FDIC and the bank. 486 U.S. at 236-38. While the issue before this Court was the timing of the *postdeprivation* hearing to which Mallen was entitled, this Court observed along the way that postponement of the hearing

---

[4] This undoubtedly was because the action in both cases was taken not by the employers, but by government regulatory agencies. Whether the employees continued to be paid by their employers during the suspensions probably was a matter as to which the government agencies were indifferent; as far as can be discerned from the case reports, at any rate, the issue was not raised by the suspension orders.

until after the suspension took effect clearly was justified by "the congressional finding that prompt suspension of indicted bank officers may be necessary to protect the interests of depositors and to maintain public confidence in our banking institutions." *Id.* at 240-41. That observation was eminently understandable, because the government interest simply could not accommodate a delay in suspending Mallen from involvement with the banking industry. In this case, the equally important government interest was fully vindicated by suspension of Homar from his duties as a police officer. Postponement of the only thing that is at issue here—Homar's suspension from pay status—in no way impairs that government interest.

In sum, petitioners can take no comfort in *Mallen* and *Barry*. Indeed, by contrast to the facts of this case, *Mallen* and *Barry* reinforce the conclusion that the government interest involved here in no way justified postponement of Homar's hearing until after his suspension from pay status took effect.

C. The Clear and Workable Principle Articulated by the Third Circuit

The Third Circuit resolved this case on the basis of the general principle that "a governmental employer may not suspend an employee without pay unless that suspension is preceded by some kind of pre-suspension hearing, providing the employee with notice and an opportunity to be heard." 89 F.3d at 1016. As we have just shown, that principle derives from a faithful application of the *Mathews* balancing test, which this Court traditionally has used to determine what process is due in a given set of circumstances.

Petitioners and their *amici* assert that the Third Circuit deviated from the "flexible" analysis called for in *Mathews*, and instead adopted a "rigid" "per se rule" that "depart[s] from *Mathews*" and "carve[s] out an exception to the *Eldridge* balancing test." *See* Brief for

Petitioners at 17-18; Brief for the United States at 14; Brief of the States of Alabama *et al.* at 7-8. This "flexibility" argument is a red herring. The principle articulated by the court below is no more a departure from *Mathews* than is, for example, the principle adopted by this Court in *Loudermill* that the Due Process Clause "requires 'some kind of hearing' prior to the *discharge* of an employee who has a constitutionally protected property interest in his employment." 470 U.S. at 533 (syllabus of the reporter) (emphasis added). In both cases, the requirements of the Due Process Clause have been interpreted with respect to a particular class of cases.[5]

There simply is no merit to the contention, implicit in the briefs of petitioners and some of their *amici*, that courts may not interpret the requirements of the Due Process Clause by developing general categorical rules, but rather must decide every case from scratch through a balancing of the *Mathews* factors. *E.g.*, Brief of the States of Alabama *et al.* at 4. Such an approach would place public employers, who must apply this Court's decisions on a day-to-day basis, in an untenable position. As petitioners themselves have observed, "[w]hen these situations arise, it is important that officials know what they may and may not do, consistent with the Constitution, to protect the public." Petition for Certiorari at 12-13. The principle articulated by the Third Circuit provides precisely such guidance.

That principle is also one that is workable for the government employers who must apply it—as is evident from the Solicitor General's assurance that "[t]he procedural safeguards currently provided in routine federal dis-

---

[5] Obviously, the articulation of a general principle, such as that set forth by this Court in *Loudermill* or the Third Circuit here, does not preclude a court from considering whether a different result is required on facts that differ in some pertinent respect from those previously considered.

ciplinary actions generally comport with the [Third Circuit's] rule." Brief for the United States at 2; *see also id.* at 4-5.[6] There is no reason to think that state and local public employers could not comply with the demands of due process as well as does the federal government.[7]

---

[6] Tellingly, the Solicitor General is able to identify only two circumstances under which the principle articulated by the court below would impinge on "congressionally mandated procedures." Brief for the United States at 21-23. The first is in the case of probationary employees—but because such "nontenured" employees have no property right in continued employment, the principle articulated by the Third Circuit simply has no application to them. *Board of Regents v. Roth*, 408 U.S. 564 (1972). As to suspensions for national security reasons under 5 U.S.C. § 7532, there may or may not be a constitutional basis for making an exception in such cases to the general principle articulated by the Third Circuit. But that question can await resolution until a case presenting it arises; that such a national security exception might be appropriate in no way undermines the principle applicable generally to tenured public employees.

[7] A case from the federal sector illustrates the appropriate manner—both constitutionally and administratively—of dealing with an employee who must be suspended from duty without delay. Upon his arrest on charges of rape and other sex offenses, the employee in *Engdahl v. Department of Navy*, 900 F.2d 1572 (Fed. Cir. 1990),

> was placed on administrative leave (non-duty/with pay) until further notice. . . . On January 7, 1988 Engdahl received notice that the government intended to suspend him without pay. Engdahl was then provided an opportunity to reply, which he personally did to government officials on January 25. . . . The government issued a decision letter on January 29, 1988 suspending Engdahl without pay, effective February 1, 1988.

Id. at 1573.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Third Circuit should be affirmed.

Respectfully submitted,

ROBERT H. CHANIN
(Counsel of Record)
JOHN M. WEST
BREDHOFF & KAISER, P.L.L.C.
1000 Connecticut Avenue, N.W.
Suite 1300
Washington, D.C. 20036
(202) 833-9340
Counsel for Amicus Curiae